RECORD AND BRIEFS

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No. 16-____

IN THE
Supreme Court of the United States

KEANU D.W. ORTIZ,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since shortly after the Civil War, federal law has required specific authorization from Congress before active-duty military officers may hold a "civil office," including positions that require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii).

After President Obama nominated and the Senate confirmed Colonel Martin T. Mitchell as an "additional judge" of the Article I U.S. Court of Military Commission Review (CMCR), Judge Mitchell continued to serve as an appellate military judge on the U.S. Air Force Court of Criminal Appeals (AFCCA), including on the panel that heard (and rejected) Petitioner's appeal of his conviction by court-martial. The U.S. Court of Appeals for the Armed Forces (CAAF) rejected Petitioner's objections to such dual-officeholding, concluding that any statutory or constitutional infirmities with such dual service implicated Judge Mitchell's CMCR position, and not his eligibility to continue to serve on the AFCCA.

The Questions Presented are:

1. Whether Judge Mitchell's service on the CMCR disqualified him from continuing to serve on the AFCCA under 10 U.S.C. § 973(b)(2)(A)(ii).

2. Whether Judge Mitchell's simultaneous service on both the CMCR and the AFCCA violated the Appointments Clause.

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PETITION FOR A WRIT OF CERTIORARI

Keanu D.W. Ortiz respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 76 M.J. 189 (C.A.A.F. 2017). It is reprinted in the Appendix at Pet. App. 1a. The opinion of the U.S. Air Force Court of Criminal Appeals is not reported. It is available at 2016 WL 3681307, and is reprinted in the Appendix at Pet. App. 23a.

JURISDICTION

The Court of Appeals granted Petitioner's petition for review on October 27, 2016, Pet. App. 21a, issued an order and judgment on February 9, 2017, Pet. App. 16a, and issued an opinion respecting that judgment on April 17, 2017. Pet. App. 1a. On April 26, 2017, the Chief Justice granted Petitioner's application for an extension of time within which to file this Petition until June 9, 2017. The Court has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause provides that the President:

> shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the

> appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

U.S. CONST. art. II, § 2, cl. 2. The Commander-in-Chief Clause provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." *Id.* art. II, § 2, cl. 1.

As relevant here, the military dual-officeholding statute provides that:

> Except as otherwise authorized by law, an officer to whom this subsection applies [including "a regular officer of an armed force on the active-duty list"] may not hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate.

10 U.S.C. § 973(b)(2)(A)(ii). A 1983 amendment to the statute further provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." *Id.* § 973(b)(5).

INTRODUCTION AND STATEMENT OF THE CASE

The Questions Presented are already before the Court in *Dalmazzi* v. *United States*, No. 16-961, and *Cox* v. *United States*, No. 16-1017. Unlike those cases, however, the Court of Appeals in Petitioner's case reached the merits of (and rejected) the statutory and

constitutional objections to Judge Mitchell's dual officeholding. *See* Pet. App. 6a–13a. Thus, although this Court can—and should—reach the merits in *Dalmazzi*, this Petition provides an additional vehicle for ensuring that the important statutory and constitutional questions raised in all three petitions are promptly resolved. *See* Brief for the United States in Opposition at 22, *Dalmazzi* v. *United States*, No. 16-961 (U.S. filed May 15, 2017) [hereinafter "U.S. *Dalmazzi* Brief"] (explaining that this case presents the same questions as *Dalmazzi* and *Cox*, but "without the threshold jurisdictional obstacle [on which CAAF relied] and in a case in which the CAAF passed upon the relevant claims"). It should therefore be granted regardless of whether certiorari is granted in *Dalmazzi* and *Cox*.

A. Legal Background

Since shortly after the Civil War, Congress has generally prohibited active-duty military officers from holding a second non-military position within the Executive Branch. *See* Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319. Although subsequent measures have carved out a handful of express exceptions to this dual-officeholding ban, the general prohibition remains in force. *See* 10 U.S.C. § 973(b).

More than an antiquated technical provision, the dual-officeholding ban is designed "to assure civilian preeminence in government, *i.e.*, to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle* v. *Warner*, 522 F.2d 882, 884 (9th Cir. 1975); *see also Memorandum for the General Counsel, Gen. Servs. Admin.*, 3 OP. O.L.C. 148, 150 (Apr. 10, 1979) [hereinafter "1979 OLC Memo"] ("That

section embodies an important policy designed to maintain civilian control of the Government."). As the Office of Legal Counsel (OLC) explained in 1983, "the provision was intended to bar the appointment of regular military officers to *any* appointive positions in the civil government, irrespective of the importance of the office, the permanence of the appointment, or the likelihood of interference with the officer's military duties." Off. of Legal Counsel, *Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* 15 (May 17, 1983) [hereinafter "1983 OLC Memo"] (emphasis added).[1] This was so because "allowing active duty regular military officers to hold civil office [would be] 'in conflict with the fundamental principle of republican institutions.'" *Id.* at 11 (quoting Cong. Globe, 41st Cong., 2d Sess. App. 3403 (May 12, 1870) (statement of Sen. Sumner)).

Among other things, § 973(b) makes it unlawful for an active-duty military officer to "hold, or exercise the functions of, a civil office in the Government of the United States . . . that requires an appointment by the President by and with the advice and consent of the Senate," except where such service is "otherwise authorized by law." 10 U.S.C. § 973(b)(2)(A)(ii). Thus, as relevant here, the dual-officeholding ban applies to all "civil offices" held either by principal Executive Branch officers, *see Myers* v. *United States*, 272 U.S. 52 (1926), or by inferior officers whose appointment has not properly been vested in some other body. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring presidential nomination and Senate advice and consent for inferior

1. The 1983 OLC Memo is available at https://perma.cc/YLM8-KTR6.

officers the appointment of whom Congress has not vested "in the President alone, in the courts of law, or in the heads of departments").

The dual-officeholding claim in this case arises from the unique structure of the U.S. Court of Military Commission Review (CMCR). That court was created in 2006 (and substantially reformed in 2009) to serve as an intermediate appellate court between military commissions convened under the Military Commissions Act (MCA), 10 U.S.C. §§ 948a–950t, and the U.S. Court of Appeals for the District of Columbia Circuit. *Id.* § 950f.

In the MCA, Congress provided two different mechanisms for staffing the CMCR with judges. First, the Secretary of Defense was empowered to "*assign* persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces." *Id.* § 950f(b)(2) (emphasis added). This provision apparently contemplates the assignment of judges already serving on the service-branch-specific Courts of Criminal Appeals (CCAs) within the military justice system. *See id.* § 866(a) (referring to "appellate military judges").

CCA judges are Executive Branch inferior officers for purposes of the Appointments Clause, *Edmond* v. *United States*, 520 U.S. 651, 661–66 (1996). Active-duty military officers (who are already Executive Branch inferior officers) may thus be "assigned" to the CCAs as judges, rather than "appointed" thereto. *See Weiss* v. *United States*, 510 U.S. 163, 174–76 (1994). But because the CMCR, unlike the CCAs, is not subject to appellate (or other) supervision within the Executive Branch, CMCR judges are almost certainly

principal officers, for reasons the D.C. Circuit detailed (while reserving a ruling) in *In re Al-Nashiri*, 791 F.3d 71, 82–85 (D.C. Cir. 2015), and to which the Court of Appeals alluded below. *See* Pet. App. 13a.

CMCR judges therefore hold an office "that requires an appointment by the President by and with the advice and consent of the Senate," 10 U.S.C. § 973(b)(2)(A)(ii), a conclusion the Executive Branch seems to share. Thus, in direct response to the D.C. Circuit's ruling in *Al-Nashiri* (and after initially having been "assigned" to the CMCR in 2014), Judge Mitchell was "appointed" to the court using the MCA's second staffing mechanism. *See* 10 U.S.C. § 950f(b)(3). That provision authorizes the President to "*appoint*, by and with the advice and consent of the Senate, additional judges to the [CMCR]." *Id.* (emphasis added). Every judge who has joined the CMCR since the D.C. Circuit's ruling in *Al-Nashiri* has similarly been "appointed" to that court.[2]

CMCR judges also hold a "civil office." The political branches have long embraced "a very liberal interpretation of the phrase 'civil office'" in § 973(b). *Army Officer Holding Civil Office*, 18 OP. ATT'Y GEN. 11, 12 (1884); *see* 1979 OLC Memo, *supra*, at 150 n.4 ("The Attorneys General . . . have ruled that . . . the policy of the statute points to a very broad

2. Even if CMCR judges are inferior officers, the appointment of active-duty military officers to such positions still triggers § 973(b)(2)(A)(ii) because *appointments* to the CMCR (unlike *assignments* to it) may only be made by the President "by and with the advice and consent of the Senate." 10 U.S.C. § 950f(b)(3). As a result, Petitioner's statutory argument does not turn on whether "additional" CMCR judges are principal or inferior officers for purposes of Article II; either way, they hold a "civil office" within the meaning of § 973(b)(2)(A)(ii).

interpretation of the term 'civil officer.'"). To that end, the Justice Department has concluded that, "[i]f the position is one established by statute, and if its duties involve the exercise of 'some portion of the sovereign power,' it is a 'civil office' within the prohibition of § 973(b)." 1983 OLC Memo, *supra*, at 24; *see also* 44 COMP. GEN. 830, 832 (1965) ("The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent; and they must involve some exercise of the sovereign power."). Judges appointed to the CMCR under § 950f(b)(3) easily meet this definition; the position is created by law, it has definite duties imposed by law, and it involves a clear exercise of sovereign (judicial) power.

The very breadth of the term "civil office" is why Congress in 1983 added three narrowing conditions to § 973(b)—including the requirement at issue here, *i.e.*, that the civil office require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii); *see also Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 OP. O.L.C. 1, 9–10 (Aug. 2, 2016) [hereinafter "2016 OLC Memo"] (describing the motivation and purpose of the 1983 amendments to § 973(b)).

Any doubt that CMCR judges hold a "civil office" is resolved by the 2009 amendments to the MCA, which reconstituted the CMCR as an Article I "court of record." 10 U.S.C. § 950f(a); *see also In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016).[3] Thus, as in *Freytag* v.

3. Indeed, the position of "appointed judge" on the CMCR under § 950f(b)(3) was *created* by the 2009 statute. Under the MCA as originally enacted in 2006, judges could only be "assigned" to the CMCR. *See* Military Commissions Act of 2006,

C.I.R., 501 U.S. 868 (1991), "the clear intent of Congress [was] to transform" the CMCR from an entity wholly within the Executive Branch "into an Article I legislative court," *id.* at 888, the judges of which hold a quintessential "civil office." *See, e.g.*, *Winchell* v. *United States*, 28 Ct. Cl. 30, 35 (1892).[4]

Nor is service by military officers as "additional judges" of the CMCR under 10 U.S.C. § 950f(b)(3) "otherwise authorized by law." Congress added that clause in 1956 to reflect the fact that "other laws enacted after the date of enactment of [5 U.S.C. § 5534a] authorize the performance of the functions of certain civil offices." 10 U.S.C. § 3544 (1958) (Historical and Revision Notes). What these other laws have in common is clear and unambiguous indicia of Congress's intent to override the dual-officeholding ban. *See, e.g.*, *id.* § 528 (expressly allowing appointment of certain military officers to positions within the CIA or the Office of the Director of National Intelligence). *See generally* 1983 OLC Memo, *supra*, at 16–17 n.21 (collecting examples); Dwan V. Kerig, *Compatibility of Military and Other Public Employment*, 1 MIL. L. REV. 21, 85 (1958) (same).

As OLC concluded in 1979, the policy behind the dual-officeholding ban "cannot be overcome implicitly by a broad and vague statutory authority to designate

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Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2621 (formerly codified at 10 U.S.C. § 950f(b)).

4. Notwithstanding the breadth of the term "civil office," the CMCR tersely concluded in *Al-Nashiri* that its judges do not hold a "civil office" under § 973(b) because "[d]isposition of violations of the law of war by military commissions is a classic military function." Pet. App. 30a.

[a civil officer] in the absence of express language stating that such designation is to be effective notwithstanding the mandate of 10 U.S.C. § 973(b)." 1979 OLC Memo, *supra*, at 150; *see also id.* ("Where Congress wishes to permit a military officer to occupy a civilian position . . . without forfeiting his commission, it has done so explicitly.").

In contrast, the MCA says nothing about appointing military officers, as such, to serve in a "civil office" as "additional judges" under 10 U.S.C. § 950f(b)(3). The only language in § 950f that refers to military officers is the authority provided to the Secretary of Defense to "*assign* persons who are appellate military judges to be judges on the [CMCR]" so long as they are "commissioned officer[s] of the armed forces." 10 U.S.C. § 950f(b)(2) (emphasis added).

Section 950f(b)(3), in contrast, includes no similar indicia of legislative intent. This Court has recognized a well-settled—and constitutionally significant—difference between the words "assign" and "appoint" in this context. Thus, the fact that § 950f(b)(2) refers only to the former "negates any permissible inference that Congress intended that military judges should receive a second *appointment*, but in a fit of absentmindedness forgot to say so." *Weiss*, 510 U.S. at 172 (emphasis added). The MCA's reference in § 950f(b)(2) to "appellate military judges" therefore comes nowhere near to providing the type of specific authorization required for active-duty military officers to also hold office as "additional judges" under § 950f(b)(3). *See, e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

This understanding is confirmed by the history of § 950f(b), the language of which was first enacted in the 2006 MCA—under which the CMCR was not a court of record. If Congress did not express an intent to override § 973(b) when it created the CMCR in 2006, such an intent cannot be inferred from reenactment of the same language as part of its 2009 overhaul of the MCA.

Despite these understandings, three of the five judges currently appointed to the CMCR also serve as active-duty military officers (and, indeed, active judges of the Army Court of Criminal Appeals), regularly hearing cases on both courts. This Petition, like the petitions in *Dalmazzi* and *Cox*, calls upon the Court to determine the legality and constitutionality of this novel arrangement.

B. Procedural History

Petitioner, an Airman First Class in the U.S. Air Force, was convicted of knowingly and wrongfully viewing, possessing, and distributing child pornography in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. He was sentenced to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction in rank. Because of the sentence, his appeal was referred to the Air Force Court of Criminal Appeals (AFCCA).

On June 1, 2016, a three-judge AFCCA panel that included Judge Mitchell summarily rejected Petitioner's appeal. Pet. App. 23a. Judge Mitchell had also been serving on the CMCR since October 28,

2014, when he was "assigned" to that court under 10 U.S.C. § 950f(b)(2). But after the D.C. Circuit in *Al-Nashiri* called into question the constitutionality of such an "assignment," he was nominated by President Obama under 10 U.S.C. § 950f(b)(3) to an "appointment" as an "additional judge" on the CMCR. 162 CONG. REC. S1474 (daily ed. Mar. 14, 2016) (nomination of Col. Mitchell to be CMCR judge "under 10 U.S.C. Section 950f(b)(3)"). The Senate confirmed him on April 28, 2016. *Id.* at S2600 (daily ed. Apr. 28, 2016) (reporting confirmation). President Obama signed Judge Mitchell's commission on May 25, 2016. *See United States* v. *Dalmazzi*, 76 M.J. 1, 3 (C.A.A.F. 2016), *petition for cert. filed*, No. 16-961 (U.S. filed Feb. 1, 2017).

Although Judge Mitchell began to "exercise the functions" of his appointed CMCR judgeship no later than May 2, 2016 (when he participated in an order in a pending case), *see* Pet. App. 33a, there is no question that, at least by the time of the AFCCA's June 1, 2016 decision in Petitioner's case, he *held* the office of "additional judge" on the CMCR, since President Obama had signed his commission one week earlier, on May 25. *See Dalmazzi*, 76 M.J. at 3. As a result of this timing, Petitioner's case became the occasion for the Court of Appeals to reach the merits of the dual-officeholding claims it had sidestepped in *Dalmazzi*.

On February 9, 2017 (two days after hearing oral argument), the Court of Appeals issued a terse "order and judgment" providing only that "the decision of the Air Force Court of Criminal Appeals is hereby affirmed," and that "[t]he opinion of the Court will be issued on a future date." Pet. App. 16a. That opinion subsequently issued on April 17, 2017. *Id.* at 1a

Writing for a unanimous court, Judge Stucky first rejected Petitioner's claim that Judge Mitchell's appointment to the CMCR disqualified him from continuing to serve on the AFCCA. In particular, the court's analysis turned on two conclusions about the 1983 amendments to § 973(b), which were enacted as part of the Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1002(a), 97 Stat. 614, 655 (1983).

First, the Court of Appeals noted that the 1983 amendments had deleted language from the version of § 973 then in force that had required the automatic termination from the military of anyone who violated the dual-officeholding ban. *See* 10 U.S.C. § 973(b) (1982) ("The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment."). The court reasoned that Congress, by deleting this language, "aimed at the holding of 'civil office' . . . rather than the performance of assigned military duty." Pet. App. 9a. Thus, § 973(b) "might prohibit Judge Mitchell from holding office at the USCMCR . . . but nothing in the text suggests that it prohibits Judge Mitchell from carrying out his assigned military duties at the CCA." *Id.*

This reading was confirmed, in the Court of Appeals' view, by Congress's simultaneous addition of a "saving" clause, § 973(b)(5), which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties," 10 U.S.C. § 973(b)(5) (2012), and which "applies by its terms to Judge Mitchell's assigned official duties at the CCA." Pet. App. 9a. Thus, although Judge Mitchell's appointment to the CMCR might very well have violated the dual-officeholding ban, the Court of

Appeals held this was not a basis upon which to challenge his continuing service on the AFCCA. *See* Pet. App. 13a ("The prohibition in § 973(b)(2)(A)(ii) may indeed affect Colonel Mitchell's status as a judge of the USCMCR, but that is not for us to decide.").

Turning to Petitioner's Appointments Clause objection to Judge Mitchell's simultaneous service on both the AFCCA and CMCR, the Court of Appeals held that there was no problem with such dual service—or with having someone who has principal officer status as an "additional judge" on the CMCR sitting alongside inferior officers on the AFCCA. *See* Pet. App. 11a–12a ("When Colonel Mitchell sits as a CCA judge, he is no different from any other CCA judge under Article 66 [of the UCMJ]. The Judge Advocate General's administrative supervision of the CCA is limited even as to the CCA, and has no authority or effect on the judicial or administrative functions of the USCMCR.").

REASONS FOR GRANTING THE PETITION

I. The Lower Courts Have Adopted Erroneous and Inconsistent Readings of the Dual-Officeholding Ban

The Court of Appeals' ruling in this case was the second appellate decision to consider whether Judge Mitchell's appointment to the CMCR violated § 973(b), along with the CMCR's own decision in *Al-Nashiri* (in which Judge Mitchell participated). *See* Pet. App. 25a; *see also ante* at 8 n.4. Although both courts rejected such a challenge, they did so for reasons that are independently unconvincing and mutually inconsistent.

In *Al-Nashiri*, for example, the CMCR concluded that its "additional judges" do not hold a "civil office"

because they are exercising "a classic military function." Pet. App. 31a. In *Ortiz*, by contrast, CAAF suggested that "Section 973 *might* prohibit Judge Mitchell from holding office *at the USCMCR*," Pet. App. 9a (emphases added), but held that his CMCR appointment did not disqualify him from continuing to sit on the Air Force CCA because "the current statute neither requires the retirement or discharge of a service member who occupies a prohibited civil office," thanks to the 1983 amendments thereto. *Id.* Neither of these arguments is consistent with the text, history, or purpose of § 973(b)—or with the consistent interpretations that provision has long received from both the Justice Department and the Comptroller General.

Taking the CMCR's analysis first, as explained above, an "additional judge" sitting on the CMCR unquestionably holds a "civil office" within the meaning of § 973(b), a term that has long received "a very liberal interpretation." *Ante* at 6 (quoting *Army Officer Holding Civil Office*, 18 OP. ATT'Y GEN. 11, 12 (1884)). OLC has suggested the statutory prerequisite is satisfied so long as "the position is one established by statute, and . . . its duties involve the exercise of 'some portion of the sovereign power.'" 1983 OLC Memo, *supra*, at 24. It is therefore irrelevant whether, as the CMCR held, "[d]isposition of violations of the law of war by military commissions is a classic military function." Pet. App. 30a–31a. As OLC has explained, "the applicability of the prohibition was not to depend on whether the duties of the civil office were undertaken in obedience to military orders." 1983 OLC Memo, *supra*, at 16. But even if it is relevant to the definition of "civil office" that "[d]isposition of violations of the law of war by military commissions is

a classic military function" (and it is not), this characterization is not a fair summary of the work of the CMCR itself, as opposed to the trial-level military commissions that sit at Guantánamo.[5]

Although the Court of Appeals' analysis in this case merits more attention, its interpretation of § 973 rests on a significant over-reading of the purpose and impact of the 1983 amendments to § 973(b). To begin with, the Court of Appeals misread the plain text of the saving clause, which insulates "any action undertaken by an officer in furtherance of *assigned* official duties." 10 U.S.C. § 973(b)(5) (emphasis added). After the 1983 OLC Memo concluded that the longstanding practice of assigning military lawyers to serve as Special Assistant U.S. Attorneys (SAUSAs) to prosecute offenses committed by civilians on military installations violated § 973(b), Congress both narrowed the scope of "civil office" to exclude SAUSAs and insulated the thousands of prosecutions undertaken by those "assigned" officers from legal challenge. *See* Pet. App. 8a & n.1.

In other words, the focus of § 973(b)(5) was on duties carried out by military officers in civil offices to which they had unlawfully been "assigned" under the pre-1983 version of § 973(b), such as the JAG lawyers' service as SAUSAs. Because the 1983 amendments

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5. The CMCR hears *appeals* from such dispositions as an Article I court of record, which is not "classic" as military commissions have only been subject to direct appellate review since 2005. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). Nor is it "inherently military," as the CMCR includes civilian judges and has exercised jurisdiction over non-law-of-war offenses. *See Bahlul* v. *United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam), *petition for cert. filed*, No. 16-1307 (U.S. Mar. 28, 2017).

prospectively limited the definition of "civil office" to positions generally requiring an "election" or an "appointment," the saving clause's reach was, in practice, retroactive. *See Reserve Officer Holding Civil Office*, 4 CIV. L. OP. JAG A.F. 391, 391 (Feb. 14, 1991) (holding that clause applied to insulate service in a civil office only prior to September 24, 1983—the date on which § 973(b)(5) entered into force).

The Court of Appeals mistakenly read the 1983 amendments to have done much more—and to have effectively repealed § 973(b)'s prohibitions altogether. On its view, the saving clause would permit military officers to accept prohibited civil offices—or even elective office—and continue to serve on active duty without any consequence. In addition to its inconsistency with the text and purpose of the 1983 amendments, this reading is also internally incoherent; application of the saving clause to the *military* office would be pointless if the sole penalty for violating § 973(b) were, as the Court of Appeals concluded, disqualification from the unauthorized *civil* office.

The Court of Appeals' reasoning also assumes, despite the absence of any indicia of such legislative intent, that Congress intended to abrogate the common law doctrine of incompatibility. *See Lopez* v. *Martorell*, 59 F.2d 176, 178 (1st Cir. 1932) ("[A]n office holder was not ineligible to appointment or election to another incompatible office, but acceptance of the latter vacated the former. This rule is of great antiquity in the common law . . . ."). *But see Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of

long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

Not only do the text and legislative history of the 1983 amendments evince no such congressional purpose, they point rather squarely in the opposite direction. Thus, the same section of the statute that amended § 973(b) separately authorized the President to appoint an active-duty military officer to serve as Chairman of the Red River Compact Commission, and provided that his acceptance of such an appointment "shall not terminate or otherwise affect [his] appointment as a military officer," Department of Defense Authorization Act, 1984, § 1002(d), 97 Stat. at 656; *see also* S. REP. NO. 98-174, at 258 (1983).

On the Court of Appeals' reading, this proviso was wholly unnecessary. But Congress clearly disagreed, and the Department of Defense has disagreed as well; it continues to view administrative separation as the proper sanction for a violation of § 973(b) absent special circumstances not present here. *See* Political Activities by Members of the Armed Forces, Dep't of Def. Directive 1344.10, § 4.6, at 9 (Feb. 19, 2008). Indeed, there would have been no need for the 2016 OLC Memo considering "whether a military officer may continue on terminal leave after he is appointed to a federal civilian position covered by 10 U.S.C. § 973(b)(2)(A)," 2016 OLC Memo, *supra*, at 1, if that officer was otherwise not subject to military separation. Thus, the appropriate remedy for the violation of § 973(b) in petitioner's case is the nunc pro tunc disqualification of Judge Mitchell from service on the AFCCA. *See Ryder* v. *United States*, 515 U.S. 177, 184–85 (1995).

Given the gravity of the dual-officeholding issue, and the depth of its impact on pending cases within both the court-martial and military commissions systems, such a flawed interpretation of § 973(b)'s ban is worthy of this Court's review on its own terms. But certiorari is especially warranted because of the incongruity between the Court of Appeals' analysis in this case and the CMCR's reasoning in *Al-Nashiri*: The CMCR is of the view that its "additional judges" do not hold a "civil office" at all; the Court of Appeals is of the view that "additional judges" of the CMCR very well *may* hold such an office, but "that is not for us to decide," Pet. App. 13a, because any remedy for a violation of the dual-officeholding ban rests with the CMCR. *See id.* Such buck-passing by these two appellate courts does not settle the statutory questions raised in these cases. If anything, it simply adds to the continuing uncertainty over the status of the CMCR's military-officer judges, and underscores the urgency of having the matter resolved by this Court.

II. The Lower Courts' Interpretations Have Raised, Rather than Resolved, Serious Constitutional Questions

Beyond rendering inconsistent verdicts on the statutory objection to Judge Mitchell's dual officeholding, both appeals courts have also given short shrift to the significant constitutional problems that their statutory readings would necessarily provoke under both the Appointments Clause and the Commander-in-Chief Clause of Article II. Indeed, the constitutional questions raised by Judge Mitchell's dual officeholding not only provide a reason to conclude that his appointment to the CMCR

terminated his military service, but they also provide an independent justification for this Court's review.

The Court of Appeals rejected Petitioner's Appointments Clause objection, contending it wrongly "presumes that Col. Mitchell's status as a principal officer on the USCMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges." Pet. App. 11a. In the Court of Appeals' view, there is no Appointments Clause problem anytime an Executive Branch principal officer also holds a separate position as an Executive Branch inferior officer.

The difficulty with this reasoning is that, in the process, the Court of Appeals ignored the possibility that the two positions, while not formally incompatible, might be functionally incompatible. After all, if an additional judge of the CMCR (as a principal officer) could serve alongside a judge of the AFCCA (as an inferior officer), the same logic would allow the President to nominate (and the Senate to confirm) the sitting Secretary of Defense to serve on the AFCCA. But in that scenario, there is an obvious "incongruity" in having an individual with such authority (1) serving in a second position through which he is subordinate to other Executive Branch officers; while at the same time (2) sharing decisionmaking authority with inferior officers who may well be unduly influenced by his principal office. *Cf. Morrison* v. *Olson*, 487 U.S. 654, 675–76 (1988) (discussing the prospect of functional incompatibility through the "incongruity" of the overlapping functions (quoting *Ex parte Siebold*, 100 U.S. 371, 398 (1880))). This concern is especially acute where, as here, the distinct offices involve overlapping personnel—in contrast to circumstances in which an individual

holds offices in two completely unrelated Executive Branch entities.

Whether such an arrangement rises to the level of functional incompatibility that is prohibited by the Appointments Clause (if not the separation of powers more generally) is a difficult question of first impression. *Cf. Nguyen* v. *United States*, 539 U.S. 69 (2003) (interpreting statutes to prohibit Article III and Article IV federal judges from serving on same court of appeals panel); *id.* at 83 n.17 (suggesting that allowing such mixed panels would "call into serious question the integrity as well as the public reputation of judicial proceedings"). It is also one that can easily be avoided here, by interpreting Judge Mitchell's appointment to the CMCR as terminating his military commission and therefore disqualifying him from continuing to serve on the AFCCA. *See Ryder*, 515 U.S. at 184–85. Either way, it is a question that deserves far more careful consideration and scrutiny than that provided by the Court of Appeals (to say nothing of the CMCR).

Moreover, neither the Court of Appeals nor the CMCR even *noted*, let alone resolved, the serious Commander-in-Chief Clause problem that arises from Judge Mitchell's service on the CMCR—since CMCR judges appointed under 10 U.S.C. § 950f(b)(3) "may be removed by the President only for cause and not at will." *Khadr*, 823 F.3d at 98. They thus "cannot . . . be removed by the President except [for] . . . inefficiency, neglect of duty, or malfeasance in office," *i.e.*, they have "good-cause tenure." *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487, 493 (2010).

If a CMCR judge is a civilian, this good-cause tenure protection raises no constitutional problem. But where, as here, the judge at issue is an active-duty military officer, such a constraint on the President's power raises constitutional concerns of the first order. *E.g.*, *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]"). Indeed, it is well settled that it would be unconstitutional for Congress to "insulate [a military] officer from presidential direction or removal." David Barron & Martin Lederman, *The Commander-in-Chief at Its Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 1103–04 (2008). Yet if the dual-officeholding ban does *not* prohibit active-duty military officers from serving as CMCR judges, then the good-cause removal protection provided by 10 U.S.C. § 950f(b)(3) would have exactly that unconstitutional effect.

III. Only this Court Can Conclusively Settle the Questions Presented

Finally, there is no reason to believe that further litigation in the lower courts is likely to remedy the statutory errors—or to provide answers to the serious constitutional questions—outlined above. The Court of Appeals considers the matter settled, as it has cleared its docket of the 100-plus cases that raise dual-officeholding questions. *See* C.A.A.F., Daily Journal (May 2017), http://www.armfor.uscourts.gov/newcaaf/journal/2017Jrnl/2017May.htm (last visited May 17, 2017). There is also no obvious mechanism for military commission defendants to challenge the CMCR's ruling in *Al-Nashiri* until after a conviction is

affirmed by a CMCR panel that includes an active-duty military officer, which could be years away.[6] And the government has also now argued to the CMCR that "[i]t is unclear whether a criminal defendant would [even] have standing to obtain disqualification of a judge on [Commander-in-Chief Clause] grounds." Appellant's Response to Appellee Mohammad's Motion to Disqualify at 4, *United States* v. *Mohammad*, No. 17-002 (Ct. Mil. Comm'n Rev. filed May 15, 2017). Simply put, absent this Court's intervention, the problematic impasse summarized above is likely to persist, all while more and more cases implicating these defects arise.

Finally, if Petitioner is correct that the appropriate remedy for Judge Mitchell's violation of the dual-officeholding ban is his termination from the military nunc pro tunc, that remedy is beyond the Court of Appeals' power to direct. *See Clinton* v. *Goldsmith*, 526 U.S. 529, 535 & n.7 (1999). Of course, that fact poses no obstacle to Petitioner's ability to obtain the specific relief he seeks—Judge Mitchell's disqualification from his AFCCA panel. But it does underscore, more broadly, the extent to which only

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6. Although the D.C. Circuit has appellate jurisdiction over the CMCR, that jurisdiction only extends to appeals from "a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [CMCR])." 10 U.S.C. § 950g(a); *see Khadr* v. *United States*, 528 F.3d 1112 (D.C. Cir. 2008).

Thus, the CMCR's rejection of the dual-officeholding challenge in *Al-Nashiri*, *see ante* at 8 n.4, is effectively unreviewable by the D.C. Circuit until after the CMCR has ruled on Nashiri's (or another affected defendant's) post-conviction appeal—which may not be for many years. *See In re Al-Nashiri*, 835 F.3d 110, 134 (D.C. Cir. 2016), *petition for cert. filed*, No. 16-8966 (U.S. filed Jan. 17, 2017).

this Court can conclusively resolve the recurring and thorny questions raised by the appointment of active-duty military officers as CMCR judges.

* *

The merits of the questions presented deserve plenary briefing and argument. Because the government has opposed certiorari in *Dalmazzi* and *Cox* on threshold procedural issues as well as the merits, *see* U.S. *Dalmazzi* Brief, at 22, the Court should grant all three Petitions. If it agrees with the petitioners in *Dalmazzi* and *Cox* that the threshold issues pose no obstacle to reaching the merits, this petition can be consolidated with those for purposes of briefing and argument. If, instead, it agrees with the government on either of the threshold questions, then, as the government itself all-but concedes, this case becomes the best vehicle for reaching and resolving the merits. *See id.* at 22. Either way, certiorari is clearly warranted here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 19, 2017

APPENDIX

No. 16-__

IN THE

Supreme Court of the United States

KEANU D.W. ORTIZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES, Appellee
v.

Keanu D. W. ORTIZ, Airman First Class
U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

Argued February 7, 2017

Decided April 17, 2017

Military Judge: L. Martin Powell

For Appellant: *Major Lauren A. Shure* (argued); *Major Johnathan D. Legg* and *Brian L. Mizer*, Esq. (on brief).

For Appellee: *Major G. Matt Osborn* (argued); *Colonel Katherine E. Oler* and *Gerald R. Bruce*, Esq. (on brief).

Amici Curiae for Appellee: *Colonel Mark H. Sydenham, Lieutenant Colonel A. G. Courie III, and Major Anne C. Hsieh* (on brief)—*for Army Government Appellate Division. Colonel Valerie C. Danyluk*, USMC, *Lieutenant Commander Justin C. Henderson*, JAGC, USN, *Lieutenant James M. Belforti*, JAGC, USN, *and Brian K. Keller*, Esq. (on brief)—for Navy-Marine Corps Appellate Government Division.

Amicus Curiae in Support of Neither Party: *Philip Sundel,* Esq. (argued); *Brigadier General John G. Baker,* USMC, and *Captain Brent G. Filbert,* JAGC, USN (on brief) —for Military Commissions Defense Organization.

Judge STUCKY delivered the opinion of the Court, in which Chief Judge ERDMANN, and Judges RYAN, OHLSON, and SPARKS, joined.

Judge STUCKY delivered the opinion of the Court.

While he was serving as a judge on the United States Court of Military Commission Review (USCMCR), under an appointment by the President with the advice and consent of the Senate, Colonel Martin T. Mitchell simultaneously served as an appellate military judge on the panel of the United States Air Force Court of Criminal Appeals (CCA) that reviewed Appellant's case. We granted review of two issues: (1) whether his simultaneous service on the two courts violated the Appointments Clause of the Constitution; and (2) whether he was statutorily barred from sitting on the CCA. We specified an additional issue, asking whether Colonel Mitchell's appointment to the USCMCR made him a principal officer in light of 10 U.S.C. § 949b(4)(C), (D) (2012), which authorize the Secretary of Defense to reassign or withdraw appellate military judges from the USCMCR.

We hold that Appellant is not entitled to relief because the applicable statute, 10 U.S.C. § 973(b) (2012), does not by its terms terminate Colonel Mitchell's position as an appel-late military judge on the CCA, and because, in any event, the statute saves Colonel Mitchell's actions in Appellant's case. We further hold that Colonel Mitchell's status as re-gards the CCA does not violate the Constitution's Appointments Clause. U.S. Const. art. II, § 2, cl. 2. In light of these holdings, we need not answer the specified issue.

I. Procedural History

A military judge sitting alone convicted Appellant, consistent with his pleas, of knowingly and wrongfully viewing, possessing, and distributing child pornography. Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012). The convening authority approved the adjudged sentence: a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The CCA affirmed in a summary disposition. *United States v. Ortiz*, No. 38839, 2016 CCA LEXIS 337, 2016 WL 3681307 (A.F. Ct. Crim. App. June 1, 2016).

II. Background

In the Military Commissions Act of 2009, Pub. L. No. 111-84, div. A., tit. XVIII, § 1802, 123 Stat. 2190, 2603 (2009), Congress established the United

States Court of Military Commission Review (USCMCR). 10 U.S.C. § 950f(a) (2012). As amended in 2011, Pub. L. No. 112-81, § 1034(c), 125 Stat. 1573 (2011), the USCMCR was to consist of "one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a) (2012). The Secretary of Defense was authorized to "assign persons who are appellate military judges" to the USCMCR as "judges." § 950f(b)(2). The President was authorized to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." § 950f(b)(3).

In June 2013, the Judge Advocate General of the Air Force detailed Lieutenant Colonel Martin T. Mitchell to serve as an appellate military judge on the CCA. Judge Mitchell was promoted to the rank of colonel in June 2014. The Secretary of Defense assigned Colonel Mitchell to be a judge on the USCMCR on October 28, 2014.

In *In re Al-Nashiri*, the U.S. Court of Appeals for the District of Columbia Circuit expressed concern over whether judges on the USCMCR were principal officers, in which case the assignment of appellate military judges to that position

by the Secretary of Defense would violate the Appointments Clause of the Constitution. 791 F.3d 71, 82 (D.C. Cir. 2015) (citing U.S. Const. art. II, § 2, cl. 2). The court suggested that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges by ... re-nominating and reconfirming the military judges to be [*US*]*CMCR judges*." *Id.* at 86.

Apparently in response to *In re al-Nashiri*, the President nominated Colonel Mitchell for appointment as an appellate military judge on the USCMCR. The Senate received the President's nomination on March 14, 2016. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). The Senate gave its advice and consent to the appointment of Martin T. Mitchell as colonel on April 28, 2016. 162 Cong. Rec. S2600 (daily ed. Apr. 28, 2016). Colonel Mitchell took the oath of office of "Appellate Judge" of the USCMCR on May 2, 2016. On May 25, 2016, President Obama signed Colonel Mitchell's commission appointing him to be "an Appellate Military Judge of the United States Court of Military Commission Review."

United States v. Dalmazzi, 76 M.J. 1, 2 (C.A.A.F. 2016).

Judge Mitchell was one of three appellate military judges to participate in the Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), review of Appellant's case. Unlike in *Dalmazzi*, how-ever, the CCA's opinion in Appellant's case was issued after the President appointed Colonel Mitchell to the USCMCR, and so the issues are not moot. *See* 76 M.J. at 3.

III. Statutory Issue

The first assigned issue is:

> Whether United States Court of Military Commission Review Judge, Martin T. Mitchell, is statutorily authorized to sit as one of the Air Force Court of Criminal Appeals judges on the panel that decided Appellant's case.

Appellant contends that the position of judge on the USCMCR is a civil office, that by accepting such a position Colonel Mitchell's commission as a regular Air Force officer was terminated as a matter of law, and that the UCMJ does not authorize the Judge Advocates General to assign as judges to the Courts of Criminal Appeals those who have been appointed as judges of the USCMCR.

A regular officer of an armed force on the active duty list may not, "[e]xcept as otherwise authorized by

law, ... hold, or exercise the functions of, a civil office in the Government of the United States ... (ii) that requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A) (2012).

From its enactment in 1870, the statute provided that "any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby." Act of July 15, 1870, ch. 294, § 18, 16 Stat. 319. *See also* R.S. tit. xiv, ch. 1, § 1222 (2d ed. 1878). That statute was replaced in 1968, with one that stated the "acceptance of such a civil office or the exercise of its functions by such an officer terminated his military appointment." Pub. L. No. 90-235, § 4, 81 Stat. 753, 759 (1968). The statute was substantially amended in 1983. Pub. L. No. 98-94, tit. X, pt. A, § 1002, 97 Stat. 614, 655 (1983). The language automatically terminating the officer's military appointment was repealed and a savings clause was added: "Nothing in this subsection shall be construed to in-validate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. § 973(b)(5). However, the fundamental prohibition on the holding of a civil office was retained. 10 U.S.C. § 973(b)(2)(A).

We decide questions of statutory construction de novo. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015). From the earliest times, we have held to the "plain meaning" method of statutory interpre-

tation. Under that method, if a statute is unambiguous, the plain meaning of the words will control, so long as that meaning does not lead to an absurd result. *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014); *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012); *United States v. Graham*, 16 M.J. 460, 462–66 (C.M.A. 1983); *United States v. Dickerson*, 6 C.M.A. 438, 449–50,20 C.M.R. 154, 165–66 (1955). The essential question underlying the first assigned issue is whether Judge Mitchell's appointment to the USCMCR terminated his military com-mission and thereby nullified his participation in any case at the CCA. We hold that it did not.

The 1983 amendments to the statute were occasioned by an opinion of the Justice Department's Office of Legal Counsel, which opined that the longstanding practice of appointing military judge advocates as Special Assistant U.S. Attorneys violated § 973.[1]

While there is much that is unsettled about this situation, the aim of the statute is clear. The evil sought to be protected against is the unauthorized holding of civil office by officers of the armed forces on

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[1] The report language on the provision does not go beyond that situation. S. Rep. No. 98-174, at 22?–34 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 1081, 1122–24. However, in view of the unambiguous nature of the statutory language, resort to legislative his-tory is unnecessary.

active duty, which is thought to threaten "civilian supremacy in the conduct of governmental affairs." S. Rep. No. 98-174, at 232 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 1081, 1122. Thus, the prohibitions in the statute are aimed at the holding of "civil office" (here, civil office requiring presidential appointment with Senate advice and consent) rather than the performance of assigned military duty. Section 973 might prohibit Judge Mitchell from holding office at the USCMCR—a question that is not before us—but nothing in the text suggests that it prohibits Judge Mitchell from carrying out his assigned military duties at the CCA. The wording of the savings clause at subsection (b)(5), "Nothing in this subsection shall be construed to invalidate any action taken by an officer in furtherance of assigned official duties" comports with this interpretation, and applies by its terms to Judge Mitchell's assigned official duties at the CCA.

Contrary to Appellant's argument, the current statute neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination. The language supporting Appellant's argument was expressly repealed over thirty years ago. Accordingly, Judge Mitchell's military commission, and therefore, his service on the CCA, was un-affected by his appointment to the USCMCR.

IV. Appointments Clause

The second assigned issue is as follows:

> Whether Judge Martin T. Mitchell's service on both the Air Force Court of Criminal Appeals and the United States Court of Military Commission Re-view violates the Appointments Clause given his status as a principal officer of the United States Court of Military Commission Review.

The Appointments Clause of the Constitution provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

U.S. Const. art. II, § 2, cl. 2.

Appellant alleges that Congress intended to establish the USCMCR as an independent Article I court and protected its judges from removal other than for cause. He then argues that assigning a principal officer appointed to the USCMCR with advice and consent to a CCA with inferior officers violates the

Appointments Clause. This is because mixing principal and inferior officers on a CCA allows the Judge Advocates General to "exercise an indirect veto" over the principal officers on the CCA. The CCA, according to this argument, can be "packed" by the assignment of military officers and the appointment of a chief judge.[2] Article 66, asserts Appellant, "is being implemented in a way that puts military officers, and by extension the Judge Advocate General, in the position to exercise a formal supervisory authority over the lone principal officer on the CCA."

The problem with this argument is that it presumes that Colonel Mitchell's status as a principal officer on the USCMCR somehow carries over to the CCA, and invests him with authority or status not held by ordinary CCA judges. That is not the case. One is a principal or an inferior officer by virtue of appointment and exercise of the duties of the office. When Colonel Mitchell sits as a CCA judge, he is no different

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[2] The brief asserts that, unless appointed by the President with advice and consent, CCA judges must be military officers. It cites *United States v. Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014) for that proposition. That is not what *Janssen* held. The case held that civilians appointed to the CCAs must be appointed in one of the methods set out in the Appointments Clause *for inferior officers*. In the case of the appointment at issue in *Janssen*, there was no statutory authority for such appointment. The lack of such authority was the reason for requiring the default method of presidential appointment with advice and consent to be used.

from any other CCA judge under Article 66. The Judge Advocate General's administrative supervision of the CCA is limited even as to the CCA, *see Edmond v. United States*, 520 U.S. 651, 664 (1997), and has no authority or effect on the judicial or administrative functions of the USCMCR. The scheme devised by Congress and the Executive is not illogical in a situation in which service as a USCMCR judge is perforce a part-time activity. *See In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016) (stating that the USCMCR "is an unusual court in that its caseload depends on the number of military commission proceedings appealed to it. At any given time, therefore, the Court's judges may have very little to do"). Just as military officers on active du ty hold three- and four-star ranks only while assigned to billets carrying those ranks, *see* 10 U.S.C. § 601 (2012), so Colonel Mitchell and the others similarly placed enjoy the perquisites of office only while exercising the functions of the office. We see no Appointments Clause problem from the point of view of Colonel Mitchell's exercising the functions of an appellate military judge under Article 66.

It is important to note what we need not and do not decide here. First, we decide no statutory issue beyond that set out above. We do not decide whether the USCMCR is a prohibited civil office or whether it is "authorized by law" ac-cording to § 973. On the statutory issue, we simply hold that § 973 does not operate to invalidate the actions military officers appointed to civil office take in furtherance of their military duties

or to require the retirement or discharge of these officers. The prohibition in § 973(b)(2)(A)(ii) may indeed affect Colonel Mitchell's status as a judge of the USCMCR, but that is not for us to decide.

Second, we decide no issue under the Constitution's Appointments Clause beyond that treated above. We intimate no opinion as to the jurisdiction, functions, or operation of the USCMCR, or Colonel Mitchell's membership on it. By virtue of his presidential appointment to the USCMCR, Colonel Mitchell may well be a principal officer; certainly, the Executive's response to *al-Nashiri* would seem to indicate an executive intent to treat these appointees as principal officers, but that is a question for another day, as are any Appointments Clause questions pertaining to the USCMCR in its earlier incarnation.

Finally, we need not decide the specified issue, which again goes to Colonel Mitchell's status as a principal officer vel non on the USCMCR.

IV. JUDGEMENT

The judgment of the United States Air Force Court of Criminal Appeals is affirmed.

UNITED STATES, Appellee
v.

Keanu D. W. ORTIZ, Airman First Class
U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

JUDGMENT

[STAMPED MANDATE
ISSUED: 4/28/17
By: Signature of Clerk of Court
OPINION ATTACHED]

This cause came before the Court on appeal from the United States Air Force Court of Criminal Appeals and was argued by counsel on February 7, 2017. On consideration thereof, it is, by the Court, this 17th day of February, 2017,

ORDERED and ADJUDGED:

The decision of the United States Air Force Court of Criminal Appeals is hereby affirmed in accordance with the opinion filed herein this date.

[STAMPED: UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

CERTIFIED TO BE A TRUE COPY OF THE JUDGMENT

SIGNATURE
WILLIAM A. DECICCO
CLERK
DATE: APRIL 28, 2017]

FOR THE COURT

William A. DeCicco
Clerk of the Court

UNITED STATES, Appellee
v.

Keanu D. W. ORTIZ, Airman First Class
U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

ORDER AND JUDGMENT

On consideration of the briefs of the parties, the briefs of *amici curiae*, and oral argument, it is, by the Court, this 9th day of February, 2017,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed. The opinion of the Court will be issued on a further date. C.A.A.F. R. 43(b). A petition for reconsideration may be filed no later than 10 days after the date of the issuance of said opinion.

FOR THE COURT

William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force

Appellate Defense Counsel (Shure)
Appellate Government Counsel (Osborn)
Amici Curiae (Baker, Hsieh, Henderson)

UNITED STATES, Appellee
v.

Keanu D. W. ORTIZ, Airman First Class
U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

ORDER

On further consideration of the granted issues in the above-entitled case (Daily Journal, October 27, 2017), it is, by the Court, this 16th day of December, 2016,

ORDERED:

That Issue II is hereby amended as follows:

II. WHETHER JUDGE MARTIN T. MITCHELL'S SERVICE ON BOTH THE AIR FORCE COURT OF CRIMINAL APPEALS AND THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS STATUS AS A **PRINCIPAL** OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

That the petition for grant of review is also granted on the following specified issue:

III. WHETHER JUDGE MARTIN T. MITCHELL WAS IN FACT A PRINCIPAL OFFICER FOLLOWING HIS APPOINTMENT BY THE PRESIDENT TO THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW IN LIGHT OF THE PROVISIONS OF 10 U.S.C. § 949b(4)(C) AND (D), AUTHORIZING REASSIGNMENT OR WITHDRAWAL OF APPELLATE MILITARY JUDGES SO APPOINTED BY THE SECRETARY OF DEFENSE OR HIS DESIGNEE.

That the parties will file contemporaneous briefs and a joint appendix on the granted issues as amended and the specified issue on or before January 24, 2017;

That reply briefs will not be filed; and

That *amicus curiae* briefs under Rule 26(a)(1) will be filed on or before January 24, 2017, and motions for leave to file *amicus curiae* briefs under Rule 26(a)(3) will be filed on or before January 17, 2017. Should said motions be granted, *amicus curiae* briefs under Rule 26(a)(3) will also be filed on or before January 24, 2017

FOR THE COURT

William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Shure)
Appellate Government Counsel (Osborn)

UNITED STATES, Appellee
v.

Keanu D. W. ORTIZ, Airman First Class
U.S. Air Force, Appellant

No. 16-0671

Crim. App. No. 38839

United States Court of Appeals for the Armed Forces

ORDER GRANTING REVIEW

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 27th day of October, 2016,

ORDERED:

That said petition is hereby granted on the following issues:

I. WHETHER UNITED STATES COURT OF MILITARY COMMISSION REVIEW JUDGE, MARTIN T. MITCHELL, IS STATUTORILY AUTHORIZED TO SIT AS ONE OF THE AIR FORCE COURT OF CRIMINAL APPEALS JUDGES ON THE PANEL THAT DECIDED APPELLANT'S CASE.

II. WHETHER JUDGE MARTIN T. MITCHELL'S SERVICE ON BOTH THE AIR FORCE COURT OF

CRIMINAL APPEALS AND THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW VIOLATES THE APPOINTMENTS CLAUSE GIVEN HIS STATUS AS A SUPERIOR OFFICER ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW.

No briefs will be filed under Rule 25.

FOR THE COURT

William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Shure)
Appellate Government Counsel (Osborn)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KEANU D.W. ORTIZ
United States Air Force

ACM 38839

1 June 2016

Sentence adjudged 15 April 2015 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: L. Martin Powell (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Gerald R. Bruce, Esquire.

Before

ALLRED, MITCHELL, and MAYBERRY
Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

PER CURIAM:

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are AFFIRMED.

[SEAL] FOR THE COURT

LEAH M. CALAHAN
Clerk of the Court

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,
Appellant
v.
ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,
Appellee

ORDER

LIFTING STAY
AFFIRMING PRIOR ORDERS
DENYING DISQUALIFICATION AND RECUSAL MOTIONS
SETTING ORAL ARGUMENT

CMCR CASE NO. 14-001

May 18, 2016

BEFORE:
MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges

On October 15, 2014, appellant requested oral argument. On October 16, 2014, appellee replied and

did not object to oral argument. Oral argument was scheduled for November 13, 2014.

On October 14, 2014, appellee filed a petition for a writ of mandamus and prohibition in the Court of Appeals for the District of Columbia Circuit asking that court to order the disqualification of Judges Weber and Ward, the two military judges then on the panel assigned to hear the appeal. Appellee contended their assignment by the Secretary of Defense to our court violates the Commander-in-Chief Clause and the Appointments Clause of the U.S. Constitution. *See* Appellee's Pet. for Writ of Mandamus & Prohibition, *In re Al-Nashiri,* No. 14-1203 (D.C. Cir. Oct. 14, 2014).

On the eve of the oral argument, the Court of Appeals for the District of Columbia Circuit granted a stay in the proceedings for the purpose of giving it sufficient opportunity to consider appellee's mandamus petition. Order, *In re Al-Nashiri,* No. 14-1203 (D.C. Cir. Nov. 12, 2014).

On June 23, 2015, the Court of Appeals for the District of Columbia Circuit denied the appellee' s mandamus petition, remanded the case back to our court, and lifted that Court's stay. *In re Al-Nashiri,* 791 F .3d 71 (D .C. Cir. 2015); Order, *In re Al-Nashiri,* No. 14-1203 (D.C. Cir. June 23, 2015).

On June 26, 2015, we granted the requests to hold this case in abeyance pending possible presiden-

tial nomination and Senate confirmation of the military appellate judges. *See In re Al-Nashiri,* 791 F.3d at 86 (suggesting such nomination and confirmation would "put to rest any Appointments Clause questions"). On March 14, 2016, the Senate received the nominations of Judges Mitchell and King to our court.[1] The Senate confirmed Judges Mitchell and King on April 28, 2016, 2 and they were sworn as USCMCR judges on May 2, 2016.[2]

On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders. Our court issued several procedural orders involving stays, extensions, recusals, and assignment of judges as well as the following substantive orders: granting on September 25, 2014, appellant's motion for leave to file an outsized brief; denying on October 6, 2014, appellee's motion to recuse the two military judges on the panel,

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[1] *See* 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016) (indicating receipt of President's nominations of Colonel Martin T. Mitchell, U.S. Air Force, and Captain Donald C. King, U.S. Navy, as appellate military judges on the United States Court of Military Commission Review).

[2] U.S. Cong., Nominations of 114th Cong., PN 1219, https://www.congress.gov/nomination/114th-congress/1219 (Judge Mitchell), and PN 1224, https://www.congress.gov/nomination/114thcongress/1224 (Judge King). (Encl. I, 2)

alleging they were assigned to the USCMCR in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and could not be freely removed in violation of the Commander-in-Chief Clause, *id.* cl. 1; denying on October 6, 2014, appellee's motion to "terminate the devolution of its judicial responsibilities onto the Clerk of Court."; denying on October 10, 2014, appellee's motion to dismiss the appeal as untimely; and granting on October 20, 2014, appellant's motion to attach documents to the appendix accompanying its brief.

On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion, and we approved the extension request.

On May 16, 2016, we received appellee's response. Appellee moved to continue the stay; to disqualify the military judges, Judges Mitchell and King; and to recuse Judges Mitchell and King from deciding the disqualification motion. As one of several alternatives to disqualification, Appellee seeks an order "confirming Col Mitchell and CAPT King's newfound civilian status[.]" Appellee cites 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016)[3] and 10 U.S.C. 973(b) as the basis

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[3] The language of the 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016) is that the Senate confirmed the "Air Force nomination of Martin T. Mitchell, to be colonel"

for disqualification. Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process. Moreover, the Senate previously confirmed Judge Mitchell to Colonel, and Judge King to Captain more than two years ago. On April 28, 2016, the Senate confirmed Judges Mitchell and King as appellate military judges in accordance with the Secretary of Defense's recommendation and the President's nomination. *See* note 2, *supra.*

Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process.

Title 10 U.S.C. § 973(b)(2)(A) provides, "Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States-- ... (ii) that requires an appointment by the President by and with the advice and consent of the Senate." Appellate military judges are specifically authorized by law under 10 U.S.C. § 950f(b)(2), and 10 U.S.C. § 973(b)(2) does not prohibit Judges Mitchell and King from acting as appellate military

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and "Navy nomination to Donald C. King, to be Captain." It mirrors the closing phrase of PN 1219 and 1224.

judges.[4] Title 10 U.S.C. §§ 950f(b)(2) and 973(b)(2) do not define the term "civil office", and there is no evidence that Congress intended commissioned officers appointed as appellate military judges to the Court of Military Commission Review to occupy a civil office.[5] The 2009 Military Commissions Act states, "The Court shall consist of one or more panels, each composed of not less than three appellate military judges." 10 U.S.C. § 950f(a). Military commissions are used "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). Disposition of violations of the law of war by military commissions

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[4] Title 10 U.S.C. § 950f(b)(2) states, "The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title."

[5] *See* Department of Defense Directive Number 1344.10, Political Activities by Members of the Armed Forces (Feb. 19, 2008) Section E2.3. (defining "civil office" as "A non–military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.").

is a classic military function and Judges Mitchell and King do not occupy a "civil office" when serving as appellate military judges on the Court of Military Commission Review.

Therefore, it is hereby

ORDERED that appellant's April 29, 2016 request to lift our stay of litigation of appellant's appeals, which were initially filed on September 19, 2014 and March 27, 2015, is GRANTED.

ORDERED that appellant's motion that we reconsider the orders our Court previously decided in this case is GRANTED.

ORDERED that orders our Court previously decided are AFFIRMED.

ORDERED that Judges Mitchell and King have considered appellee's May 16, 2016 motion to recuse. Judges Mitchell and King have declined to recuse themselves. The motion to recuse is DENIED.

ORDERED that appellee's May 16, 2016 motion to disqualify Colonel Mitchell and Captain King is DENIED.

ORDERED that oral argument will be heard at 10:00 a.m. Eastern Time on June 2, 2016, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

[DEPARTMENT OF DEFENSE SEAL]

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,
Appellant
v.
ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI,
Appellee

ORDER

CMCR CASE NO. 14-001

May 2, 2016

BEFORE:
MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges

On June 26, 2015, appellant filed an unopposed motion moving "the Court to stay the proceedings while it explores options for re-nomination and reconfirmation of the military judges as U.S.C.M.C.R. judges." Appellant explained that the stay sought is for all litigation on the two government appeals filed with our Court. Appellee did not object to the suspension of proceedings.

By a series of orders, our Court ordered the continued suspension of the hearing schedule and oral argument. The President nominated, and on March 14, 2016, the Senate confirmed Judges Mitchell and King. On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders and decisions. On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion.

Therefore, it is hereby

ORDERED that the suspension of the briefing schedule and oral argument is continued in this case. Appellee's motion to delay responding to appellant's April 29, 2016 motion until May 16, 2016 is GRANTED.

FOR THE COURT:

//signature//
Mark Harvey
Clerk of Court,
U.S. Court of Military Commission Review

Copy to:
Convening Authority, OMC
Judges Listed
Appellate Counsel